ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 86-5375

RECEIVED
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CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether, after reconsideration in light of Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965 (1985) pursuant to this Court's remand in Burger v. Kemp, ___U.S.___, 106 S.Ct. 41 (1985), this Court should grant a writ of certiorari to review the circuit court's finding that the trial court's alleged burden-shifting charge on intent was harmless beyond a reasonable doubt?

2.

Whether this Court should grant a writ of certiorari to review Petitioner's contention that he was rendered the ineffective assistance of counsel, which contention has been found to be totally without merit by every state and federal habeas corpus court and upon which issue this Court granted certiorari and remanded at Burger v. Zant, ___U.S.___, 104 S.Ct. 1652 (1984), but subsequently did not grant certiorari at Burger v. Zant, ___U.S.___, 106 S.Ct. 41 (1985), after the circuit court again affirmed the denial of relief?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia the Petitioner's conviction was affirmed; however, the Petitioner's sentence of death was vacated and a new trial was ordered as to punishment in Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment and on July 19, 1979 the Petitioner was again sentenced to death. On direct appeal from the reimposition of the death penalty the Supreme Court of Georgia affirmed the Petitioner's sentence in Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980 by the state habeas corpus court, which denial of relief was affirmed by the Supreme Court of Georgia on that same date. From the denial of habeas corpus relief in the state courts, on October 2, 1980 the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division.

After conducting an extensive evidentiary hearing on March 4, 1981 the district court, on April 29, 1981 rendered its Order and Judgment granting the Petitioner habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. The district court afforded habeas corpus relief in this regard based solely upon the circuit court's decision in Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981).[1] The district coert denied Petitioner's request for habeas corpus relief on all other allegations contained in his petition.

On May 11, 1981 the Respondent filed his notice of appeal from the district court's grant of habeas corpus relief. Petitioner filed a timely cross-appeal from that portion of the district court's Order denying habeas corpus relief on all other allegations contained in the petition.

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[1]On Argument before the United States Court of Appeals for the Eleventh Circuit, counsel for the parties agreed that this Court's then pending decision in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) would control dispostion of the sole basis upon which habeas corpus relief was afforded by the district court. As is revealed by an examination of the circuit court's opinion below at Burger v. Zant, 718 F.2d 979, 982 (11th Cir. 1983), in light of this Court's opinion in Zant v. Stephens, supra, the district court's grant of habeas corpus relief was reversed.

On October 13, 1983, after extensive briefing and oral argument, the United States Court of Appeals for the Eleventh Circuit rendered its opinion reversing the district court's grant of habeas corpus relief. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing en banc were denied. On February 27, 1984 the circuit court denied Petitioner's request to stay the mandate pending filing of an application for a writ of certiorari in this Court. On March 6, 1984, upon receipt of the mandate of the circuit court, the district court entered its Order making the judgment of the United States Court of Appeals for the Eleventh Circuit the judgment of the district court.

On May 29, 1984, this Court granted certiorari and remanded the instant case to the circuit court for reconsideration in light of Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984). Burger v. Zant, ___U.S.___, 104 S.Ct. 2652 (1984).

The circuit court remanded this matter to the district court for reconsideration as required by this Court's order. Burger v. Zant, 741 F.2d 1274 (11th Cir. 1984). After reexamination of the effective assistance of counsel issue in light of Strickland v. Washington, supra, the district court again found no constitutional error.

On February 5, 1985 the circuit court affirmed the district court's finding that Burger was in fact rendered the effective assistance of counsel. Burger v. Kemp, 753 F.2d 930 (1985). Burger's petition for rehearing en banc was denied on March 25, 1985.

Petitioner next petitioned this Court for a writ of certiorari upon claims of ineffective assistance of counsel and the existence of an alleged burden-shifting charge given by the trial court on the issue of intent. This Court, in Burger v. Kemp, ___U.S.___, 106 S.Ct. 41 (1985), granted certiorari and

remand for reconsideration in light of Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965 (1985) on the burden-shifting charge issue only.

After reconsideration pursuant to this Court's remand, the circuit court found the trial court's charge on intent to constitute harmless error beyond a reasonable doubt. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986). On July 23, 1986, Petitioner's petition for rehearing and suggestion for rehearing en banc was denied.

This instant application by Burger for the writ of certiorari has been prompted by the circuit court's affirmation of the district court's denial of habeas corpus relief.

STATEMENT OF FACTS

As noted by the Supreme Court of Georgia on the appeal taken by the Petitioner following his retrial on sentencing and the reimposition of a sentence of death, "[t]he facts surrounding the death of the victim, Roger Honeycutt, are amply set out in Burger v. State, supra [242 Ga. 28, 247 S.E.2d 834] and its companion case, Stevens v. State, 242 Ga. 34 (247 S.E.2d 838)(1978) and will not be repeated here." Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980). Because the facts underlying Petitioner's reimposed sentence of death are the same as those adduced on his trial of January 23 and 24, 1978 which resulted in his conviction and original sentence of death, the transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 24, 1978.

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88). Arriving at the Savannah Airport on September 4, 1977, Botsford telephoned the army base to ask about getting a ride from the airport to Fort Stewart. (T. 88-89). He spoke to Petitioner who told him that he and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport driving a taxicab. (T. 90). After Botsford got in, with Petitioner driving, he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95).

Stevens informed Botsford that he and Petitioner had forced the cab driver with a knife and knife sharpener to give them money, perform "unnatural acts" and then get into the car trunk. (T. 96). Although Stevens did most of the talking, Petitioner was agreeing with what was said. (T. 93). Stevens then called back to the trunk: "'Are you still there?'" Botsford heard a voice reply, "Yes sir." (T. 97). Stevens showed Botsford a knife and knife sharpener, which he put under the front seat. (T. 97).

During the ride back to Fort Stewart, Stevens called back to the trunk several times asking the cab driver if he was there. (T. 103). Botsford always heard a voice answer. (T. 103). Stevens said that he had sexually assaulted the driver and that they should kill him and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the driver and he told them that he would not tell the law if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the driver go. (T. 100, 104).

The following evening, Botsford was visited at Fort Stewart by fellow soldiers Petitioner and Stevens who asked him if he had said anything. (T. 106). When Botsford told them he had not, they said they had freed the cab driver and ditched the car near Pinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Department with the information he possessed. (T. 108-109).

An army investigator, John Perzenski, was notified on September 6, 1977 of a missing cab and driver. (T. 134). Perzenski and Clarence Haire, also an army investigator, found a boot on Highway 144 with the name of Roger Honeycutt inside. (T. 135, 136, 141). They found another boot, army socks, and a piece of yellow plastic approximately 200 yards within each other on Highway 144. (T. 137-138, 144-147).

Honeycutt, the missing cab driver, was an army private also stationed at Fort Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Haire questioned members of Honeycutt's unit on September 9th in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner who told him that he had a friend who called the Shuman Cab Company about 10:00 p.m. on September 4th, but that they did not take the cab when it arrived at Fort Stewart. (T. 149-150). A Shuman cab driver

testified that he did in fact get a call from Fort Stewart on September 4th, and in response thereto, he drove there accompanied by a friend. (T. 129-130). Two men asked him if he had change for $50.00, then left and did not return. (T. 130, 131). They had told him they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

A Jackson-Denno hearing was held outside the presence of the jury at trial to determine the voluntariness of Petitioner's statements made to Investigator Haire and Wayne County Detective F.J. Shuman. (T. 169-168). The trial court heard testimony from Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. Dr. O'Haire testified that Petitioner had a "mental deficiency" and a "psychopathic personality" that made him want to do wrong. (T. 248, 250). After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268).

The jury was returned to the courtroom and Investigator Haire testified that he interviewed the Petitioner on September 12th and advised Petitioner of the Miranda warnings. (T. 269-270). Petitioner stated that he did not want a lawyer and would answer any questions posed, after which Petitioner executed a waiver of rights form. (T. 272-273). At first, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276). When informed that there existed information that he had been in possession of the missing taxicab, Petitioner made a statement. (T. 278). Investigator Haire related the contents of Petitioner's statement to the court and to the jury. Petitioner stated that when he and Stevens ran out of money while drinking beer at the enlisted men's club, Stevens suggested robbing a taxicab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men

inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner agreed to pick Botsford up at the airport. (T. 279).

Stevens and Petitioner next burglarized the dining facility where Stevens got a knife sharpener and Petitioner got a butcher knife. (T. 278). Thus armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill, and the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener around the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was instructed to pull over and get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00, the two asked the driver if he had more money, and when he stated that he did not, they forced the driver into the back seat of the taxi. (T. 281). Stevens then had the driver remove his boots and clothes which Stevens searched for money. (T. 281). With Petitioner driving, Stevens threw each item of the driver's clothing out of the window after it had been searched for more money. (T. 281). In addition to searching the driver and his clothing, Stevens and Petitioner also searched the automobile for money. (T. 281).

After robbing the driver and forcing him to disrobe, Stevens forced the victim to perform oral sodomy on him. (T. 282). Stevens then performed anal sodomy on the victim. (T. 282). Before they reached the airport, Petitioner and his cohort forced the bound driver into the trunk of the taxicab. (T. 282). Petitioner and Stevens then proceeded on to the Savannah Airport where they picked up their friend Botsford and bragged to him that they had stolen the taxicab and had the

bound driver secured in the trunk. (T. 283). Petitioner and Stevens, in order to convince Botsford of the truth of their story, called back to the driver, requiring that the driver respond. (T. 283). Stevens suggested that they kill the driver, but Botsford protested and asked them not to do so. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens drove on to Jesup, Georgia, where they careened up and down several dirt roads to make the car go "from side to side," forcing the victim to roll around in the trunk. (T. 284). The two men then stopped at a convenience store where Stevens removed the taxicab's dome light and hid it in the bushes. (T. 284).

After noticing a patrol car following them for a short period of time, Petitioner and Stevens decided to get rid of the taxicab. (T. 285). The two men drove to a "borrow pit" where they had gone swimming several times in the past. Petitioner and Stevens were careful to wipe their fingerprints from every area of the taxicab. (T. 286). Afterwards, Petitioner raised the lid of the trunk and asked the victim if he was alright. The victim responded that he was, and Petitioner closed the lid of the trunk. (T. 346). Petitioner then started the automobile and drove it into the "borrow pit," jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the taxicab as it slowly sunk beneath the surface of the water. (T. 286). Petitioner further stated to Investigator Haire that they had tied the victim's hands with cord cut from the taxicab's C.B. radio, and that they had thrown the radio into the bushes beside the "borrow pit." (T. 286). To Investigator Haire, Petitioner admitted that he and Stevens killed the taxicab driver to prevent him from identifying them later. (T. 287).

After completing his statement to Investigator Haire, Petitioner offered to show Haire where the borrow pit was located. (T. 89). Haire and two other men from the criminal investigation office, pursuant to Petitioner's directions, proceeded to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing taxicab was ultimately recovered. (T. 152, 161). A knife and a knife sharpener were found on the right floorboard of the cab. (T. 157, 158). A body in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The victim's death was established as being caused by drowning. (T. 308).

Wayne County Detective F.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the Miranda warnings. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word by word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend returned to the borrow pit to get the C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he and Stevens had driven the stolen taxicab. (T. 325). The cab's dome sign was recovered from the bushes near a convenience store, and the yellow plastic found on Highway 144 was determined to have come from the taxicab's dome sign. (T. 326, 328, 329).

Further facts will be developed in this response as needed to further illuminate any issue raised herein.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE TRIAL COURT'S ALLEGED BURDEN-SHIFTING CHARGE ON INTENT WAS HARMLESS BEYOND A REASONABLE DOUBT, ACCORDINGLY, PETITIONER'S CONTENTION TO THE CONTRARY CANNOT SERVE AS THE BASIS FOR THE GRANTING OF THE REQUESTED WRIT.

Petitioner, Christopher A. Burger, contends that the trial court's instruction on the issue of intent and malice is in conflict with this Court's holding in Sandstrom v. Montana, 442 U.S. 510 (1979) and this Court's more recent pronouncement in Francis v. Franklin, ___U.S.___, 105 S.Ct. 1065 (1985). Contrary to Petitioner's assertions, however, the language of the trial court's charge is not identical to that charge of the trial court invalidated in Francis v. Franklin, supra, but rather, is constitutionally distinguishable from the latter.

In pertinent part, Petitioner's jury was charged as follows:

> Now, by definition, ladies and gentlemen, in our state a crime is a violation of a statute of this state in which there shall be a union of joint operation of act, or omission to act, and intention, or criminal negligence. I give you certain presumptions of law that are applicable to this case.
>
> A presumption is a conclusion which the law draws from given facts. Each of these presumptions are rebuttable. That is, they are subject to being overcome by evidence to the contrary.

I charge you now the presumptions that are rebuttable. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.

A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven facts, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

(T.T. at 410-411). Blake v. Zant, 513 F.Supp. 772, 791-792 (S.D. Ga. 1981). (Emphasis Added).

It is with regard to the immediately preceding phrase, " . . . or it may be presumed when it is the natural and necessary consequences of the act," and the trial court's earlier charge that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts" th: Petitioner contends his constitutional rights were violated in that the subject charge allegedly relieved the State of its burden of proof on the element of criminal intent. As correctly noted by the district court, and affirmed by the circuit court in Burger v. Zant, 718 F.2d 979, 981 (11th Cir. 1983), there exists no per se rule against charging the truism that a person is normally presumed to intend the natural and probable consequences of his actions. United States v. Chiantese, 560 F.2d 1244, 1255-1256 (5th Cir. 1977). Thus, as stated by the Court in Sandstrom v. Montana, 442 U.S. 510 (1979), citing Ulster County Court v. Allen, 442 U.S. 140 (1969), "[t]he threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes." Id. at 514. In this regard, the Court stated:

> That determination requires careful attention to the words actually spoken to the jury (cite omitted), for whether a defendant has been afforded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Sandstrom, supra at 14. (Emphasis Added).

Construing the charge as a whole, as required by Cupp v. Naughten, 414 U.S. 141 (1973), every state and federal reviewing court which has ruled upon the merits of this claim has concluded that the charge under attack was not unconstitutionally burden-shifting. (Pretermitting the issue

of burden-shifting, in its last review the circuit court concluded that any burden-shifting effect was harmless beyond a reasonable doubt. Burger v. Kemp, 785 F.2d 890 (11th Cir. 1986).

As noted by the court in Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), in Sandstrom v. Montana, supra, this Court opined that the charge, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," without more, might well mislead a reasonable juror into believing that the presumption was either irrebuttable or subject to disproof only if the defendant could demonstrate the contrary "by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent." Potts, supra at 533, quoting Sandstrom v. Montana, 442 U.S. at 510. Despite some arguable similarities, the portions of the trial court's charge under attack by this Petitioner are constitutionally distinguishable from those condemned in Sandstrom, supra, and Francis v. Franklin, supra.

Initially, the trial court's charge that intent "may be presumed when it is the natural and necessary consequences of the act," is virtually identical to that charged approved by the circuit court in Hance v. Zant, 696 F.2d 940, 953 (11th Cir.), cert. denied, ___U.S.___, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983). Accord, Potts, supra at 533. As noted in Hance, supra, and reiterated in Potts, supra, at 533, the use of permissive language such as "may be presumed" substantially reduces the likelihood that a reasonable juror would conclude that the instruction required an inference of intent. See also Lamb v. Jernigan, 683 F.2d 1332, 1339 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983), cited in Rose v. Clark, ___U.S.__ 39 Crim.L.Rep. 3277, 3279 (1986). Accordingly, because the trial court's charge is couched in mere permissive language,

Petitioner's contention that the foregoing portion of the trial court's charge was impermissibly burden-shifting is simply without merit.

With respect to the trial court's instruction that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts," the second portion of the charge challenged by this Petitioner, a consideration of the court's charge as a whole reveals that the subject charge created nothing more than a permissive inference. Initially an examination of the court's charge reveals that after giving the foregoing charge, Petitioner's jury was immediately told that "[a] person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted." Next, Petitioner's jury was immediately informed that:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Blake v. Zant, 513 F.Supp. 772, 791-792 (S.D. Ga. 1981). (Trial tx. 409-410).

As the foregoing reveals, the trial court's use of the "is presumed" language in the challenged charge was quickly clarified by its later, often repeated charge in the permissive "may be inferred" and "may be presumed" language. Secondly, the trial court repeatedly charged that all presumptions were rebuttable and ". . .subject to being overcome by evidence to the contrary." Thirdly, the trial court charged that "[i]ntent is always a question for the jury," that intent may be shown in many ways, provided the jury finds it existed "from the evidence produced at trial," and lastly, that intent "may be inferred" from the proven circumstances surrounding the act for which the defendant was on trial, or that it "may be presumed," when it is the natural and necessary consequences of the act that the State has proven occurred beyond a reasonable doubt.

Preceding all of the instructions aforementioned, Petitioner's jury was thoroughly apprised of the defendant's presumption of innocence and the State's burden of proof on every element of the crime charged beyond a reasonable doubt. (T.T. at 404). Viewing the charge as a whole, and utilizing the reasonable juror test of Sandstrom v. Montana, supra, it is clear that the challenged instructions did not shift the burden of proof on the issue of intent or upon any other element of the offense. The subject instruction created nothing more than a permissive "inference" and Petitioner's contentions to the contrary are without merit.

(ii)

Assuming, arguendo, that the trial court's charge on intent is burden-shifting under the analysis in Francis v. Franklin, ___ U.S. ____, 105 S.Ct. 1965 (1985), which is the assumption the circuit court made in disposing of this contention, 785 F.2d 890, it is the Respondent's position that under the facts of this case the circuit court correctly concluded that this allegedly impermissible burden-shifting charge constitutes harmless error beyond a reasonable doubt.

While in Francis v. Franklin, supra, this Court declined to resolve the question of whether an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of an offense can ever be harmless, in Rose v. Clark, ___U.S.___, 39 Crim.L.Rep. 3277 (1986), this Court resolved this issue in the affirmative.

In Rose v. Clark, ___U.S.___, 39 Crim.L.Rep. 3277 (1986), the Court identified the issue before it for resolution as follows:

> This case presents the question whether the harmless error standard of Chapman v. California, 386 U.S. 18 (1967) applies to jury instructions that violate the principles of Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin, 477 U.S. ___ (1985).

Rose v. Clark at 3277.

The Court began its analysis by noting that in Chapman v. California, 386 U.S. 18 (1967), it rejected the argument that all errors of constitutional dimension necessarily require a reversal of criminal convictions. Citing its recent decision in Delaware v. VanArsdall, 475 U.S. ___ (1986), the Court opined that:

> We have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may competently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.

Rose v. Clark, at 3278.

The harmless doctrine, as contained in Chapman v. California, supra, thus recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Rose v. Clark, at 3278. Characterizing those interests in support of the Chapman v. California, harmless error doctrine as "strong interests" the Court nevertheless recognized that some constitutional errors are of such a nature as to require reversal without regard to the evidence in a particular case. These automatic reversal errors are those that deprive a criminal defendant of "basic protections" and render the criminal trial an unreliable vehicle for determining guilt or innocence. Examples of such error would be the use of a coerced confession, Payne v. Arkansas, 356 U.S. 560 (1958); complete denial of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); adjudication by a biased judge, Tumey v. Ohio, 273 U.S. 510 (1972). Rose v. Clark, at 3278-79. As a necessary corollary, a functional harmless error analysis presupposes a trial at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury. Rose v. Clark, at 3279.

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. . . . Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interests in fairness has been

satisfied and the judgment should be affirmed.

Rose v. Clark, at 3279.

Applying these principles, the Court concluded that the Chapman v. California harmless error analysis is applicable to alleged Sandstrom violations. Rose v. Clark, at 3280. In very clear language the Court opined that "[w]hen the verdict of guilty reached in a case in which Sandstrom error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interests that the rule ['the purpose of that rule is to insure that only the guilty are criminally punished' Rose v. Clark at 3279] serves." Rose v. Clark, at 3279. Accordingly, the appropriate harmless error test for a Sandstrom violation, as identified by the Court in Rose v. Clark, supra, requires consideration of the entire record with the question being:

> Whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

Rose v. Clark, at 3280.

The text of the Court's opinion in Rose v. Clark, supra, readily reveals that the Court was formulating its harmless error analysis in the factual context of a criminal proceeding in which the issue of intent had not been removed as an issue for the jury's consideration. In Rose v. Clark, supra, for example, Clark contended that he was either insane or incapable of forming the requisite criminal intent, thus Clark's defense did not remove the question of intent as an issue for the jury's consideration. Id., at 3277.

Another type of case discussed by the Court was that in which a jury is instructed to presume malice from predicate facts, only after having found the predicate facts to exist beyond a reasonable doubt. The Court noted that in many cases, the predicate facts conclusively establish intent so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. With approval the Court cited Lamb v. Jernigan, 683 F.2d 1332, 1342-43 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983), stating that:

> In that event the erroneous instructions is simply superfluous: the jury has found, in Winship's, words "every fact necessary" to establish every element of the offense beyond a reasonable doubt. (cites omitted).

Rose v. Clark, at 3279.

Discussing superfluous instructions at greater length, citing Hopper v. Evans, 456 U.S. 605 (1982). In footnote 10 the Court stated:

> As Hopper suggests, it would defy common sense to conclude that an execution-styled killing or a violent torture-murder was committed unintentionally. See Connecticut v. Johnson, 460 U.S. at 99, n. 7 (Powell, J. dissenting). It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases. Id., at 97, and n. 5.

Rose v. Clark, at 3280, n. 10.

The foregoing discussion by the Court strongly suggests that in a case such as this where the evidence reveals both a violent torture-murder [under Georgia law serious sexual abuse such as aggravated sodomy constitutes torture] and an execution-style witness elimination killing, it does defy common sense to suggest that such a killing was unintentional.

An examination of the record compiled upon the trial of the instant case reveals that Petitioner's defense removed intent from issue at trial as Petitioner's defense conceded the commission of an armed robbery, a kidnapping, aggravated sodomy and the ultimate police murder of the victim. Petitioner's defense, in light of the overwhelming evidence of guilt against him, including his own confessions, was merely one of less culpability because his co-indictee was allegedly the true architect of the criminal enterprise, and the Petitioner was merely a follower.

In the instant case, an examination of the evidence produced at trial reveals that the same overwhelmingly demonstrates Petitioner's guilt of the crimes charged. Under no reasonable review of the evidence can any conclusion be reached other than one that this Petitioner actually committed the murder at issue by first raising the trunk lid of the taxicab to check, making sure that his victim was still bound and alive, after which this Petitioner closed the trunk of the taxicab, got behind the steering wheel and drove the cab into a borrow pit filled with water, jumping out at the very last minute. This Petitioner and his co-indictee stood on the shore and watched the taxicab slowly sink below the water with the victim locked in the trunk and slowly drowning. Because the evidence of Petitioner's guilt is so overwhelming, it is Respondent's contention that the only proper conclusion to be reached is one that the subject charge, if the same is found to be burden-shifting, is harmless beyond a reasonable doubt under the standard of Chapman v. California, 386 U.S. 18 (1967).

Under these facts it defies common sense to contend that the subject killing was unintentional. "It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases." Rose v. Clark, at 3280, n. 10. Accordingly, under Rose v. Clark's harmless error analysis, the circuit court's opinion regarding the alleged Sandstrom violation should be affirmed.

II. PETITIONER'S CONTENTION THAT HE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL HAS PROPERLY BEEN FOUND TO BE WITHOUT MERIT BY EVERY STATE AND FEDERAL HABEAS CORPUS COURT, AND THUS, THIS CONTENTION CANNOT SERVE AS A BASIS FOR GRANTING THE REQUESTED WRIT.

Petitioner alleges that he was rendered the ineffective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments (1) because trial counsel was allegedly per se ineffective for not presenting evidence on the sentencing phase of trial, and (2) his trial counsel allegedy labored under a conflict of interest.

1.

With reference to Mr. Leaphart's alleged ineffectiveness, Petitioner contends that Mr. Leaphart failed to investigate or prepare for the penalty phase of trial. The legal background against which Petitioner's allegation is to be examined is well-settled. A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment and due process clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). Effective assistance of counsel, such as will satisfy the requirements of the Sixth Amendment, is counsel "reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982)(en banc), cert. granted, ___U.S.___, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied,451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394, (1981); Mays v. Balkcom, 631 F.2d 48 52, n.1 (5th Cir. 1980). Respondent further notes that in a capital case the standards for judging effective assistance of counsel remain the same as in any other case, and that the seriousness

of the charges against the defendant is simply a factor that must be considered in assessing counsel's performance. Stanley v. Zant, 697 F.2d 955, 962-963 (11th Cir. 1983). See Proffit v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982). Under this Court's holding in Strickland v. Washington, 466 U.S. 668, (1984), in order to prevail on an ineffective assistance claim:

> First, the defendant must establish that his counsel's performance "fell below an objective standard of reasonableness." (cite omitted). Once that threshold is crossed, the defendant must then demonstrate that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." (cite omitted).

Burger v. Kemp, 753 F.2d at 933.

With the foregoing in mind, Respondent now turns to the facts of the instant case. Contrary to the Petitioner's contentions, Mr. Leaphart testified at the federal habeas corpus evidentiary hearing that in addition to his investigation of the actual facts surrounding the commission of the crimes and the Petitioner's involvement therein, he also investigated Petitioner's background. (H.T. at 35, 37). In pursuing this phase of his investigation Mr. Leaphart acquired several reports from, and conversed with psychologists in Indianapolis who had examined the Petitioner on prior occasions. (H.T. at 35, 50). Mr. Leaphart spoke by telephone and conducted several personal interviews with the Petitioner's mother. (H.T. at 36). Blake v. Zant, 513 F.Supp. at 796 n.6.

Mr. Leaphart testified that he explained to the Petitioner and to the Petitioner's mother the purpose of the retrial on sentencing and the fact that he could "generally put up anything you can find that is good about anybody in mitigation of the sentence." (H.T. at 36). Mr. Leaphart further testified that his background investigation revealed that prior

to entering the Army the Petitioner had been the victim of a broken home, had been in trouble with the police in Florida after which the Petitioner had gone back north to live where he got in trouble with police again. (H.T. at 38). Mr. Leaphart further testified that he questioned Petitioner's mother regarding the existence of potential witnesses that might be used on the sentencing phase of trial. (H.T. at 44). Mr. Leaphart also located and discussed the Petitioner's case with an attorney the Petitioner had allegedly lived with. (H.T. at 44). Mr. Leaphart also testified that his conferences with the Petitioner's mother produced very little helpful evidence that could have been used on the sentencing phase of trial. (H.T. at 64). Throughout his investigation Mr. Leaphart was unable to locate the Petitioner's father, nor did any other member of the Petitioner's family contact Mr. Leaphart or come forward, or offer their testimony. (H.T. at 64).

Prior to trial Mr. Leaphart explained to the Petitioner the nature of the proceedings, how to dress and the proper demeanor for Petitioner to display at trial. (H.T. at 65-66). The Petitioner was advised of his rights and was specifically advised of his right to take the witness stand and testify in his own behalf. Mr. Leaphart testified that he discussed with the Petitioner the issue of whether the Petitioner should take the stand on the sentencing phase. (H.T. at 66). In this regard, Mr. Leaphart testified that notwithstanding the harm that would have resulted from subjecting the Petitioner to cross-examination by the district attorney, Mr. Leaphart was even more concerned with the harmful effects upon the jury of the Petitioner's gloating, indifferent and sadistic attitude.[2] (H.T. at 66). Mr. Leaphart also testified that he

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[2]In this regard, the Respondent notes that at the federal habeas corpus evidentiary hearing even counsel for the Petitioner on this application did not call Petitioner as a witness in his own behalf.

did not place the Petitioner on the witness stand because the Petitioner was unpredictable and he did not know what he would say. (H.T. at 69). Mr. Leaphart further testified that in light of the unfavorable testimony that might be brought out on cross-examination of the Petitioner's mother, i.e., Petitioner's prior encounters as a defendant with the criminal justice system, the potential harm to the Petitioner far outweighed the limited positive testimony that could have been elicited. (H.T. at 68). Obviously, such a strategic decision is of the type generally afforded all trial counsel.

Here on this application for a writ of certiorari, new counsel for Petitioner essentially contends that had he been counsel at trial he would have handled matters differently. Notwithstanding counsel's assertions, Mr. Leaphart is not rendered ineffective merely because counsel here in habeas corpus, with the benefit of the infinite wisdom of hindsight, differs with the strategy used at trial. Contrary to the Petitioner's contentions, Mr. Leaphart's testimony at the federal habeas corpus evidentiary hearing revealed that he was thoroughly familiar with Petitioner's background and that he made a reasoned tactical decision not to put the Petitioner or Petitioner's mother on the witness stand so as to keep from the jury, on cross-examination, testimony regarding the Petitioner's past criminal history. In this regard, the district court and the circuit court properly concluded that the Petitioner's contentions that Mr. Leaphart failed to investigate and prepare for the sentencing phase of trial were all without merit.

Respondent notes that on this application, as in the district court and before the circuit court, counsel for the Petitioner essentially argues that any trial attorney who fails to place the criminal defendant on the witness stand during the sentencing phase of a capital case has rendered ineffective

assistance of counsel, notwithstanding the defendant's background or the trial strategy utilized by defense counsel. Due to the inherent nature of capital litigation, it is the observation of Respondent's counsel that had Mr. Leaphart placed the Petitioner on the witness stand during the sentencing phase of trial, and had Mr. Leaphart used the "lukewarm" character testimony advocated by the Petitioner in the district court below, Petitioner would just as vigorously argue before this Court that Mr. Leaphart had rendered the ineffective assistance of counsel by so placing the Petitioner on the witness stand, thus subjecting him to a damaging cross-examination, and all for the sake of using the "lukewarm" character testimony presently presented and advocated by Petitioner. Obviously, the foregoing assumes that such testimony would have been made available to defense counsel at trial, which assumption is not only unsupported by the evidence adduced at the March 4, 1981 federal habeas corpus evidentiary hearing, but is directly contradicted by the same. As noted by the district court at Blake v. Zant, 513 F.Supp. 772, 802 n. 13 (S.D. Ga. 1981):

> However, many, if not all, the allegations made against Mr. Leaphart are directly contradicted by the record. Thus, they could not possibly be of any benefit to Mr. Burger. On the other hand, the raising of such unfounded charges must have a significant "chilling effect" on the willingness of experienced attorneys, like Mr. Leaphart, to undertake the defense of capital cases. Petitioner's attorneys here might do well to reconsider their apparent policy of routinely attacking the performance of trial counsel in light of this fact.

Respondent notes that it appears inherent in capital litigation that no matter the quality or nature of the assistance rendered by defense counsel at trial, counsel in habeas corpus will routinely contend that the same was ineffective. The instant case constitutes such an example, and Petitioner's contentions of the alleged ineffective assistance of counsel, as the same are totally without merit and without factual support in the record, cannot serve as the basis for the granting of the requested writ.

2.

Addressing Petitioner's allegation of a conflict of interest, Respondent notes that Petitioner contends that the state habeas corpus courts, the federal district court and the Eleventh Circuit Court of Appeals wrongly concluded that Mr. Leaphart, Petitioner's trial and appellate counsel, did not labor under any conflict of interest. Specifically, the Petitioner argues that because Mr. Leaphart was a member of the same law firm as the attorney who represented Petitioner's co-indictee at a separate trial, a conflict of interest existed of such a magnitude as to render Mr. Leaphart's assistance ineffective. In support of his position the Petitioner cites this Court to many cases, however, the cases primarily relied upon by the Petitioner are inapplicable as they relate to the representation at trial by one attorney of multiple defendants. Further, though an obvious fact, Respondent notes that Petitioner has conspicuously failed to note in his brief that he and his companion in the murder received separate trials before separate juries and were in fact represented by separate attorneys.

With reference to the proper legal standard to be utilized in evaluating an allegation of a conflict of interest, the courts below correctly noted:

> A conflict of interest must be actual rather than speculative before the constitutional guarantees of effective assistance of counsel are implicated.

Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Further, in United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978), citing Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) and United States v. Fannon, 491 F.2d 129 (5th Cir. 1974), cert. denied, 419 U.S. 1012 (1974) the court appropriately opined that:

> Although an accused is entitled to counsel free of conflict and obligations, not every conflict in representation will be so egregious as to constitute a violation of the Sixth Amendment. For example, joint representaion of co-defendants is not a per se violation of the Sixth Amendment.

United States v. Alvarez, supra at 1255.

In an attempt to meet his burden of demonstrating an actual conflict of interest under which Mr. Leaphart allegedly labored, Petitioner presented the testimony of Mr. Leaphart at the federal habeas corpus evidentiary hearing. The Petitioner's obvious intention in calling Mr. Leaphart as a witness was to prove that Mr. Leaphart labored under a conflict of interest due to alleged inconsistent defenses possessed by Petitioner and Stevens, and due to the "disparity in involvement in the two individuals and the disparity in age . . . ." (H.T. at 6).[3] Petitioner's contention made to the district court, repeated on appeal to the Eleventh

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[3]H.T.: refers to the transcript of the March 4, 1981 federal habeas corpus evidentiary hearing.

Circuit Court of Appeals, and presented now to this Court, is that Mr. Leaphart tailored his trial strategy, allegedly to the Petitioner's detriment, in order to protect Thomas D. Stevens. Contrary to Petitioner's contention, however, at the federal habeas corpus evidentiary hearing Mr. Leaphart testified that there existed no conflict of interest and that because Petitioner and Stevens received separate trials before separate juries, there existed no possibility of inconsistent defenses. (H.T. at 15, 62). Mr. Leaphart testified that he used a graph at trial upon which he listed each and every act performed by Stevens as compared to those acts performed by Petitioner so as to dramatically point out to the jury the disparity in the actions of the participants in the murder, the armed robbery, the kidnapping and the acts of sodomy, in an effort to demonstrate the greater culpability of Stevens. (H.T. at 20-23, 62-63). (Petitioner's Exhibit No. 1). On the aforementioned graph, which was introduced into evidence at the federal evidentiary hearing, Mr. Leaphart depicted Stevens as the chief architect of the crime, with Petitioner as an alleged "follower type." (H.T. at 23). As noted by the district court, Mr. Leaphart's habeas corpus testimony was directly supported by an examination of the trial transcript at pages 257 through 262. Further, Mr. Leaphart testified that if "crucifying" Stevens would have helped Petitioner at trial, he would have "crucified" Stevens in an instant. (H.T. at 53).

In his brief to the circuit court, and here on this application for certiorari, Petitioner contends that the alleged conflict of interest was further manifested by Mr. Leaphart's failure to offer Petitioner's testimony against Stevens in exchange for a sentence less than death. The Petitioner fails to note for this Court's benefit, however, that at the federal habeas corpus evidentiary hearing Mr. Leaphart specifically testified that notwithstanding his attempts at plea negotiations the district attorney, confronted

with a brutal and heinous murder and armed with physical evidence and sound confessions from the Petitioner, flatly refused to even discuss plea negotiations. (H.T. at 65).

> Q. Did you ever engage in any plea neogitations in this case?
>
> A. Yes.
>
> Q. Could you tell me the substance of it?
>
> A. Well, we -- I constantly all during the time I represented Mr. Burger tried to negotiate a plea with the district attorney for a life sentence and, he -- during the first trial he just flatly refused to even discuss it in any terms. And, then when we got it reversed on the sentence feature I continued to -- in that time to try to negotiate with the -- with the district attorney about entering a plea, for Mr. Burger to serve a life sentence and, he insisted on trying it and insisted on seeking the death penalty.

(H.T. at 65) (Emphasis added).

As the foregoing readily reveals, contrary to Petitioner's misrepresentations, the district attorney, in a proper exercise of his discretion, completely foreclosed any possibility of plea negotiations.

Also lacking in substance is Petitioner's contention that as a result of some, still as yet unidentified conflict of interest, Mr. Leaphart failed to properly brief and argue Petitioner's case on direct appeal. Again, Petitioner curiously and conspicuously fails to note that it was Mr. Leaphart's actions as appellate counsel which resulted in the Supreme Court of Georgia's first opinion vacating Petitioner's

originally imposed sentence of death. See Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

Having completely failed to present at the federal habeas corpus hearing any evidence of the existence of an acutal conflict of interest, the Petitioner on appeal to the circuit court, as on this application to this Court, invites this Court to engage in unwarranted speculation and assume the existence of some conflict based upon Mr. Leaphart's failure to argue Petitioner's alleged less culpability on direct appeal to the Supreme Court of Georgia. Again, Respondent notes that Petitioner has curiously failed to inform this Court that while Petitioner did not engage in the actual acts of oral and anal sodomy committed on the victim, the Petitioner did participate in the planning and the actual armed robbery and the kidnapping of the victim. Although Mr. Leaphart commendably attempted to portray Petitioner as the less culpable party before the jury, the fact remains that it was Petitioner who sadistically raised the lid of the trunk of the taxicab, inquired of the victim's well being, then closed and locked the trunk before driving the taxicab into the borrow pit. The evidence is undisputed that it was Petitioner who was the actual murderer. To argue that Mr. Leaphart's failure to contend on appeal that Petitioner, the actual murderer, was the less culpable party, constitutes evidence of the existence of an actual conflict of interest, borders on the absurd.

As correctly noted by every reviewing court below, and concluded by the district court, "[t]he facts thus present no inference of any conflict of interest actual or potential." Blake v. Zant, 512 F.Supp. 722, 796 (S.D. Ga. 1981).

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Eleventh Circuit Court of Appeals as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed, in addition to being demonstrably in accord with the applicable decisions of this Court, is soundly based upon a proper construction of federal law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage affixed thereon to:

Joseph M. Nursey
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This 1st day of December, 1966.

WILLIAM B. HILL, JR.
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